

SERVED: April 10, 2008

NTSB Order No. EA-5377

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D.C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D.C.
on the 9th day of April, 2008

_____)	
ROBERT A. STURGELL,)	
Acting Administrator,)	
Federal Aviation Administration,)	
)	
Complainant,)	
)	Docket SE-17863
v.)	
)	
ALLEN WAYNE LACKEY,)	
)	
Respondent.)	
_____)	

ORDER DENYING RECONSIDERATION

Respondent seeks reconsideration of our decision in this proceeding, NTSB Order No. EA-5348, served December 31, 2007. In that decision, we affirmed the Administrator's order and the law judge's initial decision, finding that respondent violated 14 C.F.R §§ 135.293(a) and (b), 135.299, and 91.13(a) by operating a Bell 206B helicopter on five flights for compensation or hire without having passed a written or oral test, and without having completed competency and flight checks.

The Administrator sought disposition of this case via summary judgment, based on respondent's admissions to all

factual allegations in the Administrator's complaint. The law judge granted the Administrator's motion for summary judgment, finding that no factual issues existed, and reduced the sanction from 150 days to 110 days, based on respondent's assertion that the Administrator prevented him from complying with the aforementioned regulations. Respondent appealed the law judge's decision, and asserted that the Administrator did not produce adequate evidence to prove the violations, that the Administrator did not identify facts that were material to the violations with adequate specificity, and that the law judge erred in ruling on sanction at the summary judgment stage. We denied respondent's appeal, and affirmed the law judge's decision that no genuine issue of material fact existed.

Respondent has now filed a "Motion to Reconsider Opinion and Order on Appeal from Summary Judgment," which we consider to be a petition for reconsideration under 49 C.F.R. § 821.50. Section 821.50(c) requires that such petitions "state briefly and specifically the matters of record alleged to have been erroneously decided, and the ground or grounds relied upon." Section 821.50 also provides for the submission of arguments based on new matter, in certain circumstances. Id. § 821.50(c).

In his succinct petition, respondent states that partial summary judgment "might have been proper," but that, "sanctions cannot be decided through the summary judgment procedure." Respondent's petition also states that our December 31, 2007 opinion and order does not address the issue of whether the Board may decide sanction in the context of summary judgment, and that respondent raised the issue of sanction in his appeal brief. Respondent does not cite cases or authority in his petition that provide that we may not affirm a law judge's issuance of sanction in deciding whether summary judgment is appropriate. Respondent appears to rest his argument on the contention that we do not have the authority to affirm a law judge's decision concerning sanction, and that we must bifurcate summary judgment motions sua sponte to separate the issue of sanction from that of regulatory violations.

We do not agree with respondent's argument that a hearing is necessary on the issue of sanction. Respondent's underlying appeal brief merely makes sweeping statements that respondent, in briefs that he previously filed, raised "the issue of sanctions" as a "clearly defined and articulated material issue." Respondent's brief also stated that respondent's denial in his answer of committing actions that were careless and reckless, as well as the affirmative defenses that respondent

asserted, "placed the issue of sanctions squarely in controversy." We disagree with these arguments. As the law judge stated, the Administrator clearly raised the issue of appropriate sanction in the motion for summary judgment, and respondent had the opportunity to address the sanction issue at that time, and failed to do so.

As we stated in our opinion and order for this case, a party may file a motion for summary judgment on the basis that the pleadings and other supporting documents establish that no factual issues exist, and that the party is therefore entitled to judgment as a matter of law. 49 C.F.R. § 821.17(d). Given our finding that the law judge properly determined that no issue of material fact existed concerning the regulatory violations that the Administrator alleged, it was consequently proper for the Board to review the record with regard to the appropriateness of the sanction. Here, the Administrator submitted the Sanction Guidance Table, FAA Order 2150.3A, Compliance and Enforcement Program, Appendix, in the record, and we deferred to the Table, pursuant to our longstanding precedent. See Administrator v. McCarthney, NTSB Order No. EA-5304 at 11-12 (2007), and cases cited therein. Respondent only supports his argument with citations to cases in which the Administrator had submitted a motion for *partial* summary judgment, and the law judge had ordered a hearing solely on the issue of sanction.¹ Respondent also compares this case to those in civil litigation, in which a court decides the issue of liability on summary judgment, but reserves the issue of damages for a jury. Such examples, however, do not suffice to establish the inappropriateness of the sanction that the Administrator ordered. Overall, respondent has not established that the law judge erred in issuing the sanction; therefore, we find that granting respondent's petition for reconsideration would be improper.

ACCORDINGLY, IT IS ORDERED THAT:

Respondent's petition for reconsideration is denied.

ROSENKER, Chairman, SUMWALT, Vice Chairman, and HERSMAN, HIGGINS, and CHEALANDER, Members of the Board, concurred in the above order.

¹ We have previously affirmed law judges' rulings concerning sanction in the context of summary judgment. See, e.g., Administrator v. Diaz, NTSB Order No. EA-4990 at 6 (2002); Administrator v. Barrie, NTSB Order No. EA-4801 at 4-5 (1999).